MAJLIS PERBANDARAN PULAU PINANG

v.

LIM SOO SENG

SUPREME COURT, PENANG
HARUN HASHIM SCJ
LEE HUN HOE CJ (BORNEO)
AJAIB SINGH SCJ
[CIVIL APPEAL NO. 02-376-1989]
10 NOVEMBER 1990

TORT: *Master and servant - Driving of motor vehicles - Negligence of servant - Third party injured - Recovery from servant - Whether master must reimburse servant - Need for legislation to clarify position - Whether implied term in contract of service in relation to indemnification - Lister's case.*

The respondent L was the driver of a bus operated by a local authority, M, the appellants. In the course of his employment, L injured a passenger who was attempting to board the bus. The passenger sued L and obtained damages from L who sought reimbursement from M; they refused and L sued them. His claim was dismissed by the Sessions Court. His appeal to the High Court was allowed. M now appeals.

The issue for determination was whether a servant who was negligent in the driving of a motor vehicle in the course of his employment on the highway and who was sued by a third party (who recovers damages from the servant) could, in subsequent proceedings compel a reimbursement from the master.

L argued that there was an implied term in his contract of service that in the event of an accident, he would be indemnified. Observations on *Lister's* case.

Held:

[1] a)After a survey of the judgments delivered in *Lister's* case, it was held that the servant is responsible for his own negligent acts.

(b) The fact that payment will be made by the insurance company of the employer does not detract from the law that for his negligence he is liable in damages.

[2] This causes a problem in that although paid drivers are liable to pay, they can't afford to pay. In England the problem was solved by a "gentleman's agreement". In Malaysia, there is a need for the legislature to enact a law that every person who drives a motor vehicle shall be required to take out insurance against third party risks. The consequence of such a law would be that only the real tortfeasor would be sued and not the vehicle owner under vicarious liability.

[3] The only implied term in such a contract of employment as here is that the employer will insure the vehicle against third party risks which is a requirement of law. It does not follow that if the driver is sued separately he is entitled to be indemnified by his employer in a subsequent action.

[4] Under s. 10(1)(c) of the Civil Law Act 1956, an employer may claim contribution from the negligent servant but the servant cannot claim contribution from the employer.

[Appeal allowed.]

Cases referred to:
Green v. New River Co. [1792] 4 Term Rep 589
Harmer v. Cornelius [1858] 5 CBNS 236
Lister v. Ice & Cold Storage Co. Ltd. [1957] The LR AC 555
Morris v. Ford Motor Co. Ltd. [1973] CA 1 QBD 792

Legislation referred to:
Civil Law Act 1956, s. 10(1)(c)
Road Traffic Ordinance 1958, s. 74(5)

For the appellants - Ghazi bin Ishak; M/s. Presgrave & Matthews
For the respondent - R.J. Manecksha; M/s. Triptipal Singh & Co.

JUDGMENT

Harun Hashim SCJ:

In this appeal the respondent was the driver of a bus operated by a local authority (the appellants). In the course of his employment the respondent injured a passenger who was attempting to board the bus. The passenger sued the respondent and obtained damages. The respondent paid the passenger the damages awarded and then requested reimbursement from his employers (the appellants) but they refused, whereupon he sued the appellant. His claim was dismissed by the Sessions Court. He appealed to the High Court. The learned Judge allowed the appeal. Hence the present appeal. The facts in this case are not in dispute. Both in the Sessions Court and in the High Court, the issue was one of a question of law. The same issue is before us. The learned Judge put the issue thus:

> if through a servant's negligence in the driving of a motor vehicle in the course of his employment on the highway, a third party is injured and sues the servant alone and recovers damages, which the servant pays, may the servant in subsequent proceedings compel a reimbursement from the master?

The learned President of the Sessions Court answered the question in favour of the master, relying upon the majority judgment of the House of Lords in *Lister v. Ice & Cold Storage Co. Ltd.* [1957] The LR AC 555. The learned Judge in the High Court in allowing the appeal preferred the minority judgment of Lord Denning in the Court of Appeal and that of the minority judgments of Lord Radcliffe and Lord Somervell in the House of Lords in respect of the same case.

This is a unique case in the sense that there has been no precedent of such a case in this country. The *Lister* case was also unique because it was also the first case of its kind in England. In that case, father and son were employed by the same company. The son was employed as a lorry driver and while driving in the course of his employment, injured his father. The father claimed damages from the employer (company) based on the negligence of the driver. The claim succeeded. Thereafter, in a separate case the employers claimed indemnity or contribution from the driver for the amount it had paid to the father as damages for breach of:

(a) an implied term of the contract of service that the driver would exercise reasonable care; and

(b) a duty at common law to take care.

The *Lister* case was decided in December 1956. Lord Denning in March 1973 (and by then the Master of the Rolls) had occasion to refer to *Lister's* case in *Morris v. Ford Motor Co. Ltd.* [1973] CA 1 QBD 792 to which we will refer to later. For now, we would observe that the present case is again unique because it was filed in 1985 to raise the ghost of its again.

In the normal course of events in a running-down case, the third party would sue both the driver and the employer. If he succeeds in his claim, the insurance company will pay because the employer is vicariously liable for the acts of his servants as against third parties and also because the law says so, the Road Traffic Ordinance having enacted by s. 74 that all motor vehicle owners shall take out third party risk insurance.

The object of this law is to protect members of the public from the negligent acts of motor vehicle users from injury or death. Again, in the normal course, after the insurance company has paid to the third party, the employer does not sue the driver to recover the amount paid. One reason for this non-action is that paid drivers are wage earners who are generally poor and do not have the resources to satisfy any judgments that may be recovered against them. The other reason is that insurance companies recognise this situation and adjust their premiums accordingly. The general recognition of this state of affairs is, in our view, the cause of the resulting confusion in the present case.

At common law, if a person through his negligence causes injury to another, he is liable to pay damages to the injured person. This law has been in existence for centuries and applied universally by different civilisations. It is still the law today. And it is the law in this country: see the Civil Law Act 1956. That is why the negligent driver in this case had to pay damages for causing injury to the passenger.

The issue in this case is whether the driver can claim reimbursement from his employer. It must be explained at this stage that the bus was not insured against third party risks with any insurance company as the bus is owned by a local authority and is exempted from taking out such insurance under s. 74(5) of the Road Traffic Ordinance. The appellants, however, operate their own insurance scheme called the Tabung Insurance Bandaraya. This arrangement, however, does not detract from the law applicable in respect of this part of the case. In the statement of claim the respondent pleaded:

> 14. The plaintiff avers that as he was driving the said motor bus No. PM 8095 as the servant and/or agent of the defendants or its predecessors in title for the benefit of the defendants and in the course of his employment the defendants are vicariously liable to satisfy the said judgment.
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> 15. The plaintiff avers that the said motor bus No. PM 8095 was not insured by the defendants with any Insurance Company against Third Party Risks.
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> 16. The plaintiff further avers that there must be implied a term in his contract of service that the defendants would indemnify the plaintiff in cases of accident and causing damage to third parties arising out of driving their uninsured motor buses.

In the statement of defence, the appellants pleaded:

> 11. The contents of para. 15 of the statement of claim is irrelevant as in any event the defendants put the plaintiff to strict proof of the allegations set out therein.
>
> 12. The defendants deny that there is an implied term in the plaintiff's contract of service that they would indemnify the plaintiff as alleged in para. 16 of the statement of claim and put the plaintiff to strict proof thereof.

There is no direct answer in the statement of defence to para. 14 of the statement of claim except by para. 13 a general denial to each and every allegation of the statement of claim.

In the appellant's letter of appointment dated 26 July 1971 to the respondent containing the terms and conditions of employment there is no reference whatsoever that in the event of an accident, the appellants will indemnify the respondent against third party claims. It was

for this reason that the respondent pleaded **an implied term** in his contract of service that he would be indemnified. The question arises whether such a term could be implied in the circumstances of this case.

The learned Judge held that there was such an implied term and relied on the dissenting judgment of Lord Denning in the *Lister* case. In that case Lord Denning held that servants were not normally under a contractual duty to their masters to exercise reasonable care in the performance of their duties. That left a liability in tort. For the U.K. Law Reform (Married Women and Tortfeasors) Act 1935, the employer could not as a joint tortfeasor claim indemnity or contribution. He then held that, the employer being insured, there was an implied term that he would not seek to recover contribution or indemnity from the servant.

Viscount Simonds who delivered the leading judgment in the House of Lords said at p. 572:

> It will be convenient to discuss first the question which divided the Court of Appeal namely, what, if any, were the terms in the contract of service between the parties.
>
> It is, in my opinion, clear that it was an implied term of the contract that the appellant would perform his duties with proper care. The proposition of law stated by Willes J in *Harmer v. Cornelius* [1858] 5 CBNS 236 has never been questioned: "When a skilled labourer," he said, "artizan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes - Spondes peritiam artis." Thus, if an apothecary, a watch-maker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts.... An express promise or express representation in the particular case is not necessary. I see no ground for excluding from, and every ground for including in, this category a servant who is employed to drive a lorry which, driven without care, may become an engine of destruction and involve his master in very grave liability. Nor can I see any valid reason for saying that a distinction is to be made between possessing skill and exercising it. No such distinction is made in the cited case: on the contrary, "possess" and "exercise" are there conjoined. Of what advantage to the employer is his servant's undertaking that he possesses skill unless he undertakes also to use it? I have spoken of using skill rather than using care, for "skill" is the word used in the cited case, but this embraces care. For even in so-called unskilled operations an exercise of care is necessary to the proper performance of duty.
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> I have already said that it does not appear to me to make any difference to the determination of any substantive issue in this case whether the respondent's cause of action lay in tort or breach of contract. But, in deference to Denning LJ, I think it right to say that I concur in what I understand to be the unanimous opinion of your Lordships that the servant owes a contractual duty of care to his master, and that the breach of that duty founds an action for damages for breach of contract, and that this (apart from any defence) in such a case. It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract. Of this the negligence of a servant in performance of his duty is a clear example.
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> I conclude, then, the first stage of the argument by saying that the appellant was under a contractual obligation of care in the performance of his duty, that he committed a breach of it, that the respondents thereby suffered damage and they are entitled to recover that damage from him, unless it is shown either that the damage is too remote or that there is some other intervening factor which precludes the recovery. I should note in passing that it was urged on behalf of the appellant that the respondents had not proved the quantum of damage suffered by them by proving only that judgment had been given against them and that they had paid or were liable to pay the amount of the judgment and costs. This plea could not be sustained. It appears to me to be against reason and authority: see, for example *Green v. New River Co.* [1792] 4 Term Rep. 589.

At p. 574:

> Paragraph 4 pleaded an implied term that the respondents would indemnify the appellant against all claims and proceedings brought against him for any act done by him in the course of his employment. Were it not that at one time this term appeared to hold first place in the appellant's favour I should have though that it might be summarily dismissed. It is all - embracing in its scope: whatever the degree of negligence, even of criminality, in his act: whether the respondents were covered by insurance or not, whether the act gave rise to a third party claim, which ought by law to be covered, or not; in every case the appellant would go free and the respondents bear the burden. I can neither accept an implication in such general terms nor put into the mouth of the pleader qualifications which might make the plea less unacceptable. It was in para. 5 that the implied term was pleaded which has appeared to me most worthy of consideration. It was that the appellant would receive the benefit of any contract of insurance effected by the respondents and covering their liability in respect of the action brought by Lister senior. It would, it was said, be inconsistent with this term if the respondents, having effected a policy and having been indemnified under it, then sought to recover damages from the appellant either for breach of his contractual duty of care or under the relevant provisions of the Act 1935. This is the plea which found favour with Denning LJ, and the argument was put so simply and cogently by him that I venture to quote his judgment [1956] 2 QB 180, 192; [1955] 3 All ER 460: "Take this very case, he says, "where the insurers issue a writ in the employer's name against the servant without consulting either the employer or the servant beforehand. When the servant receives the writ he will take it to his employer and say "why are you suing me? Surely you have got the money from your insurance company. So you cannot sue me." This natural comment between master and man throws a flood of light on the "implied understanding of the parties." And a little later he says: "This shows that there is an implied term in these cases whereby, if the employer is insured, he will not seek to recover contribution or indemnity from the servant.

At p. 577:

> Next - and here I recur to a difficulty already indicated - if it has become part of the common law of England that, as between the employer and the driver of a motor-vehicle, it is the duty of the former to look after the whole matter of insurance (an expression which I have used compendiously to describe the plea as finally submitted), must not that duty be more precisely defined? It may be answered that in other relationships duties are imposed by law which can only be stated in general terms. Partners owe a duty of faithfulness to each other; what that duty involves in any particular case can only be determined in the light of all its circumstances. Other examples in other branches of the law may occur to your Lordships where a general duty is presented and its scope falls to be determined partly by the general custom of the country which is the basis of the law and partly perhaps by equitable considerations. But even so, the determination must rest on evidence of the custom or on such broad equitable considerations as have from early times guided a Court of equity.
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> In the area in which this appeal is brought there is no evidence to guide your Lordships. The single fact that since the Road Traffic Act of 1930 came into force a measure of insurance against third party risk is compulsory affords no ground for an assumption that an employer will take out a policy which covers more than the Act requires; for instance, a risk of injury to third parties not on the road but in private premises. There is in fact no assumption that can legitimately be made what policy will be taken out and what its terms and qualifications may be. I am unable to satisfy myself that with such a background there can be implied in the relationship of employer and driver any such terms as I have indicated. And though, as I have said, I feel the force of the argument as presented by Denning LJ, I must point out that at least in his view the indemnity of the driver was conditional on a policy which covered the risk having in fact been taken out. It may be that this was because his mind was directed to a case where such a policy was taken out and that he would have gone on to say that there was a further implication that the employer would take out a policy whether required

by law to do so or not. But here we are in the realm of speculation. It is certain that, if the imaginary driver had said to his employer: "Of course you will indemnify me against any damage that I may do however gross my negligence may be," the employer would have said: "Yes, of course!"? For myself I cannot answer confidently that he would have said so or ought to have said so. It may well be that if such a discussion had taken place it might have ended in some agreement between them or in the driver not entering the service of that employer. That I do not know. But I do know that I am ever driven further from an assured certainty what is the term which the law imports into the contract of service between the employer and the driver of a motor-vehicle.

At p. 579:

It was contended, too, that a term should not be implied by law of which the social consequences would be harmful. The common law demands that the servant should exercise his proper skill and care in the performance of his duty: the graver the consequences of any dereliction, the more important it is that the sanction which the law imposes should be maintained. That sanction is that he should be liable in damages to his master: other sanctions there may be, dismissal perhaps and loss of character and difficulty of getting fresh employment, but an action for damages, whether for tort or for breach of contract, has, even if rarely used, for centuries been available to the master, and now to grant the servant immunity from such an action would tend to create a feeling of irresponsibility in a class of persons from whom, perhaps more than any other, constant vigilance is owed to the community. This was, I think, an aspect of the case which made a special appeal to Romer LJ. It cannot be disregarded.

On the same page concluded:

My Lords, I have come to the conclusion that the considerations which I have discussed do not permit me to imply a term such as is pleaded in any of the alternative forms adopted in the original and amended defence or advanced in argument at the bar, and that the appeal so far as it is founded on an implied term in the contract of service must fail.

To summarise, the *Lister* case decided:

(a) That the driver was under a contractual obligation of care to his employers in the performance of his duty as a driver;

(b) That the company was entitled to recover from the driver damages for breach of that contractual obligation and that there was no implied term in the contract of service that the driver was entitled to be indemnified by the company, his employer, either if the company was in fact insured or was required by the Road Traffic Act 1930, to be insured, or if, as a reasonable and prudent person, it ought to have been insured;

(c) Viscount Simonds and Lord Morton held that the company was also entitled to recover contribution from the driver under the Law Reform (Married Women & Tortfeasors) Act 1935;

(d) Lord Radcliffe and Lord Somervell, dissenting, held that it is an implied term of such a contract of employment as this that the employer will see that the driver is protected by insurance for any third party liability arising from his driving and, accordingly, neither the employer nor his insurers can sue the driver in respect of that liability.

As a result of the decision in the *Lister* case, the U.K. Minister of Labour and National Service appointed an inter-departmental committee in 1957 to study the implications of the judgment in that case as they might affect the relations between employers and workers. The report was published in 1959 and its conclusion (as quoted by Lord James in the *Morris* case at p. 813) is as follows:

> The decision in the *Lister* case shows that employers and their insurers have rights against employees which, if exploited unreasonably, would endanger good industrial relations. We think the employers and insurers, if only in their own interests, will not so exploit their rights and the evidence we have received as to the action taken by the British Employers' Confederation and the insurance industry seems to us to support this view. We do not therefore think that the decision in the *Lister* case has exposed a practical problem or that there is any need for legislation at present. If in future it should appear that employers or insurers were exploiting their rights unreasonably, the problem would, we think, have to be reviewed; in that event further consideration might be given to the possible legislation measurers which we have mentioned in our report and the various objections to them. Our conclusion does not, however, rule out any further effort to deal with the matter by voluntary methods, such as extension of the "gentleman's agreement" within the insurance field, or by collective bargaining in any individual industry.

In consequence of that report, the members of the British Insurance Association adhered to this "gentleman's agreement:

> Employers' Liability Insurers agree that they will not institute a claim against the employee of an insured employer in respect of the death of or injury to a fellow-employee unless the weight of evidence clearly indicates (i) collusion or (ii) wilful misconduct on the part of the employee against whom a claim is made: per Lord Denning at p. 799.

The "gentleman's agreement" however did not apply in the *Morris* case because the person injured was not a fellow-employee. It was held by a majority of the Court of Appeal that it was not open to insurers to pursue their right of subrogation against an employee, because of an implied term in the contract of employment, subrogation being an equitable right it could not be used when it was inequitable to do so. Lord Denning at p. 801 said:

> Everyone knows that risks such as these are covered by insurance. So they should be, when a man is doing his employer's work, with his employer's plant and equipment, and happens to make a mistake. To make the servant personally liable would not only lead to a strike. It would be positively unjust. *Lister v. Romford Ice and Cold Storage Co. Ltd.* [1957] AC 555 was an unfortunate decision. Its ill effects have been avoided only by an agreement between insurers not to enforce it. It should not be extended to this case. I would apply this simple principle: where the risk of a servant's negligence is covered by insurance, his employer should not seek to make that servant liable for it. At any rate, the Courts should not compel him to allow his name to be used to do it.

The law then is simply this - the servant is responsible for his own negligent acts. The fact that payment will be made by the insurance company of the employer does not detract from the law that for his negligence he is liable in damages. In England, the problem was solved by a **gentleman's agreement** that the insurance company after having made payment to the injured party will not seek to recover from the driver. This solution amounts to sweeping the problem under the carpet. On the one hand, paid drivers are liable to pay. On the other hand, they cannot afford to pay. The solution, in our view, as far as this country is concerned, is for the legislation to enact a law that every person who drives a motor vehicle shall be required to take out insurance against third party risks. In the case of paid drivers, it will be a matter of individual arrangement between employer and servant as to who should pay for the insurance. This will solve the problem of payment and the issue of indemnity or contribution will not arise. In passing, we think that the consequence of such a law would be that only the real tortfeasor would be sued and not the vehicle owner under vicarious liability. As the number of licensed motor vehicle drivers far exceeds the number of vehicle owners, the premiums for third party risks insurance will be much less with the added advantage that if a driver caused serious damage, no insurance company will want to insure him again or if they do, he will have to pay a much higher rate of premium.

The only implied term in such a contract of employment as here is that the employer will insure the vehicle against third party risks which is a requirement of law. It does not follow that if the driver is sued separately he is entitled to be indemnified by his employer in a subsequent action.

We accordingly hold that the learned Judge's finding in the present case of an implied term in the contract of employment that the employer will indemnify the driver in cases of accident causing damage or injury to third parties arising out of the negligent driving of the employer's motor vehicle is wrong in law.

For completeness, we would add that in the *Lister* case, the employer was claiming contribution from the servant whereas in the present case it is the driver who is claiming reimbursement from the employer. Section 10(1)(c) of the Civil Law Act provides:

> Where damage is suffered by any person as a result of a tort (whether a crime or not) - any tortfeasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

This provision is similar to the U.K Law Reform (Married Women & Tortfeasors) Act 1935. In essence, the effect is that an employer may claim contribution from the negligent servant but the servant cannot claim contribution from the employer.

Finally, we wish to emphasise that our opinions and judgment in this case is limited to cases arising out of the negligent acts of a servant in the driving of motor vehicles belonging to his employer and causing injury or death to third parties.

For the reasons stated, we allow the appeal with costs here and below. The order of the learned Judge is set aside and the order of the Sessions Court is restored.

The deposit to be refunded to the appellants.

Also found at [1991] 1 CLJ 253